

Letter of Findings Number: 04-20120462
Sales and Use Tax
Tax Years 2008 - 2011

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ISSUE

I. Sales and Use Tax—Lump Sum Contracts.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-2.5-4-9; IC § 6-8.1-5-1; [45 IAC 2.2-3-12](#); [45 IAC 2.2-4-1](#); Sales Tax Information Bulletin 60 (April 2011).

Taxpayer protests the Department's proposed assessments as it relates to invoices involving mulch.

STATEMENT OF FACTS

Taxpayer operates a mowing and landscaping business. Taxpayer was audited by the Indiana Department of Revenue (hereinafter "Department"). As a result of the audit, the Department issued Taxpayer proposed assessments for sales and use tax. Taxpayer filed a protest with the Department; a hearing was held and this Letter of Findings results. More facts will be provided as needed below.

I. Sales and Use Tax—Lump Sum Contracts.

DISCUSSION

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. A retail transaction is defined as occurring when a person "acquires tangible personal property... and transfers that property to another person for consideration." IC § 6-2.5-4-1(b)(1)-(2). Additionally, IC § 6-2.5-4-1(c)(2) provides that it "does not matter whether the property is transferred... alone or in conjunction with other property or services."

Taxpayer's protest letter to the Department states:

[T]he examination had misidentified several contracts as time and material contracts when in fact they were lump-sum contracts where the taxpayer had properly paid the sales tax upon purchase of the materials included in the lump-sum contracts. Indiana Administrative Code [45 IAC 2.2-3-12](#) and Information Bulletin [60 defines a lump-sum contract as a contract in which all of the charges are quoted as a single price. In contrast, a time and material contract is defined as a contract in which all the charges for labor, construction materials, and other items are stated separately.

Taxpayer cites to [45 IAC 2.2-3-12](#); that regulation states:

(a) Tangible personal property purchased to become a part of an improvement to real estate under a contract with an organization entitled to exemption is eligible for exemption when purchased by the contractor.

(b) In order to be exempt on such purchases, the contractor must be registered as a retail merchant, must obtain an exemption certificate from the exempt organization, and must issue an exemption certificate to his supplier.

(c) Utilities, machinery, tools, forms, supplies, equipment, or any other items used or consumed by the contractor and which do not become a part of the improvement to real estate are not exempt regardless of the exempt status of the person for whom the contract is performed.

(d) A person making a contract for the improvement to real estate whereby the material becoming a part of the improvement and the labor are quoted as one price is liable for the payment of sales tax on the purchaser [sic.] price of all material so used.

(e) A person selling tangible personal property to be used as an improvement to real estate may enter into a completely separate contract to furnish the labor to install or construct such improvement, in which case the sales tax shall be collected and remitted by such seller on the materials sold for this purpose. Such sale of materials must be identifiable as a separate transaction from the contract for labor. The fact that the seller subsequently furnished information regarding the charges for labor and material used under a flat bid quotation shall not be considered to constitute separate transactions for labor and material.

The Department notes that Sales Tax Information Bulletin 60 (April 2011), 20110427 Ind. Reg.

045110247NRA, states in part:

C. "Lump sum contract" is a contract in which all of the charges are quoted as a single price. A construction contractor may furnish a breakdown of the charges for labor, materials, and other items without changing the nature of the lump sum contract.

D. "Time and material contract" is a contract in which all the charges for labor, construction materials, and other items are stated separately.

The Audit Report states in pertinent part:

The examination of the taxpayer's sales invoices revealed that they were performing time and material

contracts when they were doing landscaping for their customers. On the invoices the taxpayer had listed various materials such as trees, shrubs, grasses, flowers, fabric, mulch, etc. that were used in the job and then stated the labor separately. (Emphasis added).

Taxpayer's protest letter states:

[T]he audit report is enclosed with the misclassified contracts highlighted, followed by copies of the actual invoices. As further proof of the inclusion of all charges as a single price, a pricing breakdown used by taxpayer is enclosed showing the components of the single price.

The invoices provided have the mulch line highlighted, and the "Pricing Break Down" relates to mulch. Thus the issue in Taxpayer's protest is the mulch, with Taxpayer arguing that the mulch always includes a labor component.

Taxpayer has not established that it can invoke lump sum contract concepts regarding the mulch sales, since mulch is not permanently part of a structure. As IC § 6-2.5-4-9 states in relevant part:

(a) A person is a retail merchant making a retail transaction when the person sells tangible personal property which:

- (1) is to be added to a structure or facility by the purchaser; and
- (2) after its addition to the structure or facility, would become a part of the real estate on which the structure or facility is located. (Emphasis added).

The Department finds [45 IAC 2.2-4-1](#) to be applicable to Taxpayer's facts:

(a) Where ownership of tangible personal property is transferred for a consideration, it will be considered a transaction of a retail merchant constituting selling at retail unless the seller is not acting as a "retail merchant".

(b) All elements of consideration are included in gross retail income subject to tax. Elements of consideration include, but are not limited to:

- (1) The price arrived at between purchaser and seller.
- (2) Any additional bona fide charges added to or included in such price for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other services performed in respect to or labor charges for work done with respect to such property prior to transfer.
- (3) No deduction from gross receipts is permitted for services performed or work done on behalf of the seller prior to transfer of such property at retail. (Emphasis added).

Under IC § 6-8.1-5-1(c) the Department's proposed assessments are presumed to be correct. Taxpayer has not met its burden of proof. Taxpayer's billing method cannot be lump sum and time and materials simultaneously—in other words, Taxpayer cannot take a portion of an invoice (i.e., the mulch) and claim its billing method is different from the other items on the same invoice. Also, the Department finds that Taxpayer has not established that mulch becomes part of the real estate, and thus Taxpayer has not shown that "lump sum" concepts are applicable to its facts.

FINDING

Taxpayer's protest is denied.

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